

Washington Department of Fish and Wildlife (WDFW)
Oiled Wildlife Care Standards Rulemaking Stakeholder Workshop
Summary
August 21, 2003

Welcome and Introduction

Eric Larsen, WDFW Oil Spill Team Manager, welcomed participants, stating that the purpose of the meeting was to update the group on the progress that has been made since the June workshop, gather further input on the potential rule subject areas, and brief the group on the next steps in the rulemaking process.

Rule Update

Eric gave an update on what has happened since the June 24th meeting.

- WDFW received the University of California Davis (UCD) report on the critical components of oiled wildlife rescue. Since receiving the UCD report, WDFW has been working to derive a short list of topics to be considered for the rule, which does include some preliminary measurements or values.
- The UCD report and the United States Fish and Wildlife Service (USFWS) draft Best Practices document regarding the care of oiled wildlife were sent to stakeholders.
- WDFW established a website with information about the rulemaking.
- WDFW staff has met several times with Department of Ecology staff to discuss the issues affecting both agencies in the rule making process.

The proposed timeline for the rule is on the website and is still considered current by WDFW. A CR 101 announcing WDFW's intention to undertake the rulemaking has been filed with the Code Reviser's Office; the next step will be to file a CR 102 with the proposed rule language, which is not expected to be done until late October 2003. The draft rule will then be presented to the WDFW Commission at a December commission meeting to be adopted as an official and enforceable rule.

Stakeholder Discussion on Preliminary Draft of Standards

Eric proposed that the discussion be separated between the two main issues in the rulemaking: the specific care standards outlined in the draft rule summary sent out by WDFW, and questions about implementation of the rule, which is part of ongoing discussions between WDFW and the Ecology. The group began by looking at the bulleted list of standards WDFW drafted prior to the meeting.

Roger Mowery asked about the status of proposed federal regulations and adoption of the recently released Best Practices standards for oiled wildlife care. Charlie Hebert stated that the

document is intended to be a guidance document, not a regulatory document. There is nothing from a national perspective that sets specific standards for wildlife care.

Eric also stated the WDFW rule would not be duplicating the USFWS document; instead, WDFW's rule will be more detailed and address the specific critical components of wildlife rescue and rehabilitation such as space, air, water quality, etc.

Frank Holmes expressed the desire to see a less prescriptive regulation. Instead of having specific dimensions for the holding pens, for example, he'd like to have the end goal of the care standard specified to allow the responsible party (RP) to deal with the details of how to accomplish that goal. This would provide for more flexibility and creativity. He suggested a minimum standard may accomplish this goal. Kip Parker agreed that a statement of minimums or ranges would be acceptable for more flexible standards (such as pen size) but not necessarily for those such as temperature, which have to be more specific or prescriptive. Kip asked if the word "optimal" might have a place in the rulemaking to create guidelines that are less prescriptive. Eric pointed out that any terms such as minimum, optimal, etc., need a definition because they can seem arbitrary to those interpreting the rule. Rules have to be clear enough so they are easy to comply with, but not so prescriptive that they are impossible to fulfill. Curt Clumpner stated that, in his experience, what the regulated community wants is a standard that says, "as long as you are higher or better than this minimum, you are in compliance."

Barbara Blackie asked if density of bird species instead of space would be a better criteria to specify. Eric responded that density of recovered birds is, indeed, the important issue in pen size and WDFW doesn't want to make the mistake of over-regulating an RP, preventing them from taking action in a spill event. However, there must be some space requirements specified to make the functions reasonable.

Mark Bentzen said that target numbers, such as birds per day that must be treated, need to be addressed before the minimum facility size can be determined. A matrix that considers, for example, number of birds in the door and out the door should be developed to then determine facility size, air temperature, etc., for all stages and sizes of rescue efforts. Eric said that is something that will be developed and will probably prove to be the most useful tool in planning for spill events. Assumptions must go into that matrix, however, and every RP can then do a risk analysis to determine how to plan for different events. WDFW is setting the standards for the care of each bird and each RP will have to determine what is needed to treat the number of birds based on their risk factors.

Roger added this rule process is telling RP's how to care for oiled wildlife, not how fast or how many. Eric agreed and said WDFW would be available to help provide the resources to answer these questions based on the care standards set here, but this rulemaking process will not address planning. This does not mean planning issues are not critical, but they are not being dealt with here because WDFW believes they are not under WDFW's authority.

Chris McCartan asked if anyone has done the math with the current numbers on the draft rule topics sheet sent out by WDFW: some of the numbers, when multiplied, have been 'mind boggling' in terms of size and cost. She asked if there had been any studies done comparing the benefits of wildlife rescue and rehab to the cost of stockpiling enough infrastructure to conduct the cleanup. She also asked if the funds might better be used in some other way, for example, to

rehabilitate a habitat elsewhere. Eric pointed out that the statute declares that care standards be set for oiled wildlife; WDFW is operating on the assumption that there is positive value in treating oiled birds, and the rulemaking is based on that assumption.

Mike Condon asked if some standards are not specifically set in the rule, shouldn't the rule reference where those standards are, such as personnel requirements or care timing?

Mike Moore said there are some issues that may fall under this rule that are not in the WDFW draft such as distance away from a facility, timing of primary care, etc. Eric agreed some issues still need to be dealt with by WDFW.

Kip asked about the requirement to provide space for food preparation, storage, medical labs, etc. when "bird numbers exceed a yet to be determined threshold." He wondered if these factors would be built into the matrix. Eric responded that the larger the spill, the more facilities you would need on hand. These services are critical components impacting the number of birds that can be successfully rehabilitated. Andy Carlson said UCD gave a list of square footage for these services based on a spill affecting 6000 birds. It will be important to get UCD to calculate when the number of birds makes the space requirements for these functions more critical, showing that a spill impacting 20 birds does not require the same amount of space for these services as one involving 1000 or 6000 birds.

John Schumacher questioned whether it was necessary to have all of these services actually in the rehabilitation facility. Nearby or accessible should be sufficient. Eric and Andy agreed, but think it is important to require the functions be available.

Michael Bergey said that some reference to labor capabilities, number of available personnel, and timing of response is something that should be specified in the care standards. Eric said WDFW does not want to regulate qualified responders (QR's) in this rule. QR's are chosen or employed by the USFWS through the Wildlife Branch of the Incident Command System at the time of a spill.

Roger asked about the role of the Wildlife Rescue Coalition in this rulemaking. He suggested Ecology needs to change the law to take responsibility for wildlife spill response away from the Coalition and shift it to industry, since industry already has to be prepared regardless of whether the state does it or not. Roger suggested this rulemaking process should take advantage of ironing out this confusion in the laws. Darlene DeGhetto, who is a member of the Coalition, said the Coalition does not have authority over industry to take action. The Coalition is a volunteer group and is intended to provide steering to this kind of rulemaking process.

Curt asked for clarity on the call for a veterinarian to oversee the rescue and rehabilitation operations. Eric said this was a placeholder bullet: WDFW is not clear yet on the degree to which this issue is already handled within the agency. WDFW is not interested in developing medical protocols but it is interested in having those who are licensed in this field oversee these operations.

Ross McDonald said his organization is waiting to see specific numbers plugged into the standards. Once those numbers are there, the necessary calculations can be done to determine if the standards can be met and how much it is going to cost. Ross asked for more clarity in the

specific standards, for example, the 300 gallons of water: when is it needed, and for how many birds? Does that volume need to be at the primary care facility or at the rehabilitation facility? Is it necessary all at once or is that volume required over time or the term of care?.

Darlene asked if anything was going to be included about feeding requirements. Eric said that feeding care, hydration, detoxification, quality of food and those kinds of standards are lumped into the same category as medical procedures. WDFW wants to ensure that the fundamentals are provided so that this kind of assessment and care will be successful. Some of these standards are already codified.

Charlie asked if WDFW wants to address euthanasia or require some policy to be developed on this decision process. This is a critical factor to determine what size of a response is needed. He also said that a written protocol gives any euthanization process legitimacy and is more transparent to the public. Mike Moore agreed, saying that if there isn't a process for triage, it can become an emotional and politically-influenced process. This decision-making criteria needs to be agreed upon before, instead of during, an event in order for it to be consistent and considered valid. Others also agreed that there would be no question after the fact whether or not too many birds were euthanized because it would be clear whether the euthanization protocol was followed. Eric said there are already rules in place that determine who can handle and euthanize a bird; this rule just needs to show adequate references to those standards. Curt suggested that a protocol for euthanization might need to be written depending on the spill event. If there are species that have priority over other species or if there are specific injuries that decrease the releaseability, the euthanization process may need to adjust.

Curt asked about the need to accommodate for species differences in the rules as far as pen and facility size. Eric responded that WDFW is comfortable with the data they have on the history of spills and the fauna involved. Over 60% of the birds in spills in Washington are murrelets. If the rules plan around the average bird size, the smaller and larger species will average out at both ends. Curt suggested this assumption be stated in the rule. Kip agreed the rule needs to state clearly that the densities are based on a modal bird species size and response needs to be flexible.

Andy suggested using another UCD standard to define space requirements: allowing space for the bird to turn around and spread its wings. This gets back to the functional need of what the pens are meant to do. Curt pointed out this criterion would then depend on the social situation of those species. Eric reiterated that reasonableness is a goal for the rule: there is a risk in using a modal bird size that the RP is over-prepared for small birds and about prepared for larger birds. The hope is that the facility size will average out with bird size in a spill event.

Frank suggested that if a major bird species was present then specific pens for those birds can be brought in after the minimum specified number is set up. Eric agreed that may be an option and reminded the group that kind of standard is a planning standard, where changes can be made to adjust to different situations and different risks.

Barbara asked about the difficulty to meet the more specific standards such as the hardness of the water. Eric said the hardness is not difficult to get but the question is how much can you get and how much of it at one time.

Darlene asked if the interval for pool water changing has been specified yet or if it would be specified in the rule. Curt said one way to determine if the water pools need to be clean is to measure surface tension; he believes this is the only published measurement used to determine water quality. Eric agreed that pools and their water quality tend to be the most important water issue for care standards and is the issue where WDFW still needs to do the most work.

Mark commented that if one rule item is very specific and others are vague it might indicate that one rule item is more important than other criteria.

Kip asked about the release component of the care process: should it be included in the rule or is there another standard elsewhere that should be referenced? The purpose of all of this is to get the birds back into the wild. Eric said release is already part of the USFWS standard.

Discussion of Standards Implementation

Eric discussed the results of the most recent meeting between WDFW and Ecology. The main reason for the meeting was to discuss how WDFW's rule will be implemented and what this rule means for contingency plan holders. The reason this rule is so complicated is because it is referenced in Ecology's statute, which makes it awkward in legal terms. The intent of WDFW's rule is to make sure the critical features necessary for bird care are in place. How that is ensured is through the planning process for a spill event. Addressing the planning is therefore critical to WDFW's goal of getting care standards implemented.

Curt pointed out that for industry to be prepared, they need to know how many birds they are responsible for in what amount of time. Without the planning, the rules will be meaningless. This planning does occur in Washington, but WDFW does not believe it is under their authority, but rather falls under Ecology's authority.

Curt emphasized again that timing and number of animals needing treatment is important to these rules. Eric said that the only timing that WDFW is comfortable creating rules around is the type of care that is required within certain time periods after a spill event.

WDFW has good data on bird seasons, populations, etc., and also has a matrix with assumptions to answer some of the planning questions. However, as several people emphasized, because the rule elements are less useful on their own than in conjunction with the planning regulations, it is vital to coordinate this rule process with Ecology's contingency plan rulemaking process. Due to Ecology's heavy workload with that process, WDFW is looking at the concept of phasing in the care standard rules. Eric asked for comment on the idea of a phased implementation of these standards and what it might mean for the rehabilitation and industry stakeholders.

Frank asked for clarification of "phasing" in terms of the rule. Eric said WDFW would like to see a process that continues at a reasonable pace declaring what these rules are going to be and gives stakeholders time to address any unanswered questions and plan for the new standards. WDFW recognizes the importance of a planning period; what WDFW wants to be careful not to do is develop a rule that has not given sufficient time for impacted parties to consider it and prepare for it. WDFW doesn't want to hold anyone out of compliance if there was not an adequate planning period.

Curt said that if a spill were to happen tomorrow, these standards would still be implementable. If these standards are from the literature, any advising during a spill will be consistent and it will say that these standards are the parameters. Without this rule, we would likely be using these standards anyway. If parties are currently developing their capacity to deal with a spill, why should they be allowed to function in a substandard way if they could be functioning by these parameters? Charlie agreed that these standards would be used because they are the best standard of care. They are not required anywhere but they serve as basic guidelines until the rule is enforceable.

Mike Moore suggested that instead of picking a date of enforcement, a milestone, in coordination with Ecology's rulemaking, be selected as the time when WDFW's care standards will go into effect. Frank agreed that coordination between the two agencies is important; any change in regulations creates a difficult process for industry and having both new rules adopted concurrently would allow industry only to have to rewrite contingency plans once. John agreed the rules should be adopted together.

Frank asked, if WDFW's rule were adopted before Ecology's rule, would responsible parties be regulated by WDFW's standards without the planning guidelines in Ecology's rule? He suggested that WDFW not adopt their rule until Ecology rule is also adopted. Mike Moore agreed, pointing out that contingency plan holders could be left in a position to make too many assumptions in order to adhere to WDFW's standards.

Frank asked if there was a legal time constraint to the rule making once it has begun that requires the process to end within a certain time frame. Eric replied that there is no such time constraint. WDFW believes that this rule should move forward so that standards could be made available for contingency planning efforts.

John asked if industry had to deal with a spill event without Ecology's planning rule in place, would WDFW's rule be enforceable? He asked if it was more of a guidance document until industry has Ecology's rule which gives the information needed for implementation. Eric said if there was a spill event with WDFW's care standards in place but without Ecology's rule in place, there would be virtually no recourse for enforcement.

Barbara said she did not understand the hesitation about moving forward with WDFW's rule; she sees this as helping Ecology's planning process. Kip agreed he didn't see the problem with proceeding with WDFW's rule. Mike Condon again suggested the idea of having a trigger for WDFW's rule tied to Ecology's rule. Frank explained he sees the problem as having only half of the implementable standards, leaving the RP in a legal situation to deal with. Once the rule is adopted, it can be brought into court, creating a situation with unimplementable and unplannable standards. Eric pointed out that WDFW has liability in this situation as well: they don't want to run the risk of getting into arenas where they hold no statutory authority. At the same time, WDFW also needs to have these standards known, because once they have gone through the scientific research to find the best practices, they would be questioned if those practices were not set as standards to follow.

Roger agreed that the newest standards should be published when they are known. However, the problem with changing the standards too frequently makes industry plan for standards that are going to change, which increases the cost for industry to comply with the regulations.

Mark asked if WDFW is planning on getting the numbers industry needs to start planning and doing risk assessments. Eric offered the data WDFW has regarding seasonal wildlife population numbers, but he said he is not comfortable making worst case scenario determination for industry telling how many birds to plan for under the care standards. He reiterated the position that WDFW does not have the authority to do so.

Frank clarified that the purpose of this rule is to say, if you have a bird this is what you have to do to clean it. How many you have to clean is based on the rules outlined by Ecology. Eric agreed, adding WDFW can provide information and technical assistance for that planning work. Eric also pointed out that there are other rules on the books about wildlife rescue more stringent and not specific to oiled wildlife, so getting these standards into rule benefits everyone.

Eric explained that WDFW and Ecology work together regularly, but they need to focus on working specifically on this issue. Everyone present would like to be kept informed about those discussions. Many people also expressed the importance of both agencies having a representative at these meetings. Many important questions came up during the morning that could have been better addressed had Ecology been present. The next meeting should be carefully scheduled to ensure all the right people can attend.

Next Steps

- A summary of today's meeting will be prepared and posted online on WDFW's Oil Spill Team website.
- WDFW will continue to work on the draft rule language. These drafts will be submitted to the group for comments, revised, and sent out again, if necessary.
- Stakeholders commit to reviewing the drafts as they are received and giving comments.
- WDFW will continue to work with Ecology to discuss common ground, address questions raised by the stakeholder group today, and discuss possible coordination of the rule processes.
- WDFW will go before the Fish and Wildlife Commission during the first week of October to brief them on the progress made to date on the rule.
- The next stakeholder meeting will be scheduled for mid-October.
- Attendees were asked to forward the meeting materials to other interested parties to keep the discussion as broad as possible.

Attendees

Mark Bentzen, WSMC
Michael Bergey, WA State Vet. Board
Barbara Blackie, Olympic Coast NMS
Andy Carlson, WDFW
Curt Clumpner, IBRRC
Michael Condon, BP/OPLC
Darlene DeGhetto, PAWS
Charlie Hebert, USFWS
Frank Holmes, WSPA
Jeff Krausmann, USFWS

Eric Larsen, WDFW
Chris McCartan, Clean Sound Cooperative
Ross McDonald, Foss Environmental
Michael Moore, PSSOA
Roger Mowery, WSMC
Kip Parker, PAWS
Sarah Sabel, Clean Rivers Cooperative
John Schumacher, Tesoro
Jeff Shaw, Polar Tankers

Lynn Lefkoff, EnviroIssues (Facilitator)
Kristine dos Remedios, EnviroIssues (Note Taker)